

Supreme Court, U. S.
FILED

NOV 22 1977

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-56

In the Matter of

EDNA SMITH,
Appellant,

On Appeal from the Supreme Court of South Carolina

BRIEF FOR AMICUS CURIAE THE STATE BAR OF CALIFORNIA

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BRIEF FOR AMICUS CURIAE
THE STATE BAR OF CALIFORNIA

INTEREST OF AMICUS CURIAE*

A. Nature of Amicus Curiae

Amicus curiae The State Bar of California (hereinafter "California Bar") is a public corporation which is, under California law, a component of the judicial branch of the state's government.

As such, the California Bar performs essential state governmental functions, including serving as an administrative arm of the Supreme Court of the State of California (hereinafter "California Supreme Court") in attorney admission, discipline and reinstatement matters. Cal.Const., art. 6, §§9, 6, 8; Cal.Bus. & Prof. Code, §§6001, 6008, 6008.1, 6008.2; Emslie v. State Bar (1974) 11

* The parties to this appeal have consented to the filing of an amicus curiae brief by The State Bar of California. A written stipulation evidencing their consent is on file in the office of the Clerk of this Court.

Cal.3d 210, 224 [13], 113 Cal.Rptr. 175, 520 P.2d 991; Brotsky v. State Bar (1962) 57 Cal.2d 287, 301 [12, 13], 19 Cal.Rptr. 153, 368 P.2d 697. With regard to matters of attorney discipline alone, the California Bar operates an elaborate disciplinary court system for the California Supreme Court, at an annual cost in excess of \$1.5 million. This cost is borne solely by the more than 54,000 members of the California Bar.

The California Bar is directed and managed by a Board of Governors (hereinafter "Board"), the members of which are public officers.* Chronicle Publishing Company v. Superior Court (1960) 54

* The Board consists of 15 attorney members elected from geographic districts by California attorneys, and 6 nonattorney members appointed from the state at large by the Governor. Cal.Bus. & Prof. Code, §§6011-6013.5.

Cal.2d 548, 566 [8], 7 Cal.Rptr. 109, 354 P.2d 637. The Board is specifically empowered by state law "[w]ith the approval of the [California] Supreme Court, . . . [to] formulate and enforce rules of professional conduct for all members of the bar in the State." Cal.Bus. & Prof. Code, §6076. The rules thus formulated, however, are not binding until approved by the California Supreme Court. Cal. Bus. & Prof. Code, §§6076-6077. Upon such approval, they become rules of that court. Barton v. State Bar (1930) 209 Cal. 677, 680 [2], 289 P. 818.

B. California's Rules Protect Constitutional Activity While Also Protecting the Public From Direct Solicitation and Ambulance Chasing

Ever since California's Rules of Professional Conduct were first formulated by the Board and approved by the California Supreme Court in 1928, they

have prohibited attorneys from soliciting professional employment for their own purposes, either directly themselves or indirectly through lay intermediaries such as ambulance chasers. See Cal. Rules of Prof. Conduct, former rule 2 (204 Cal., at p. xci); present rule 2-101 (14 Cal.3d, at p. Rules 1); proposed rule 2-101(A) [see, infra, Appendix A, at p. 1]; proposed interim rule 2-101(A) [see, infra, Appendix B, at p. 1].*

* Almost a year before this Court's decision in Bates v. State Bar of Arizona (1977) U.S., 97 S.Ct. 2691 [hereinafter "Bates"], the Board proposed to the California Supreme Court extensive -- and experimental -- revisions to California's Rules of Professional Conduct designed to permit greater flow of information about what attorneys do and cost. These proposed revisions would permit information about many California attorneys to be published in expanded, nontraditional and readily-available law lists, legal directories and telephone books, with appropriate prescriptions concerning

(footnote continued on next page)

This fundamental prohibition protects the public against situations that present

(footnote continued from preceding page) form and content to foster comparisons and prevent deception. For the convenience of this Court, they are reproduced, infra, as Appendix A.

These proposed new California rules were filed on August 26, 1976 under the title and number, In the Matter of the Proposed Repeal of Rule 2-106, Rules of Professional Conduct, Cal.Sup.Ct. Bar Misc. No. 3922.

Shortly after this Court's decision in Bates, the Board embarked on a review of its earlier proposal in light of Bates. The Board also proposed that until that review can be completed and the result acted upon, the California Supreme Court repeal the existing California Rules of Professional Conduct regarding advertising by attorneys (rules 2-101, 2-102, 2-103(A)(5), (A)(6), (A)(7), 2-106(1) and 2-106(4) [see 14 Cal.3d, at pp. Rules 1-5 and 13-14]) and adopt instead an interim rule containing two fundamental prohibitions: one against false and misleading advertising; and the other against attorneys soliciting professional employment for their own purposes, either directly themselves or indirectly through lay intermediaries such as ambulance chasers. For the convenience of this Court, the proposed interim rule is reproduced, infra, as Appendix B.

The proposed interim California rule was filed on August 17, 1977 under the same title and number as the Board's prior proposal. It is still pending before the California Supreme Court.

risks of undue influence, overreaching, misrepresentation and conflicts of interest between attorneys and the persons they seek to represent. See, e.g., Ohio State Bar Association v. Ohralik (1976) 48 Ohio St.2d 217, 357 N.E.2d 1097, prob.juris. noted May 24, 1977, sub nom. Ohralik v. Ohio State Bar Association (U.S.Sup.Ct. Docket No. 76-1650); Geffen v. State Bar (1975) 14 Cal.3d 843, 122 Cal.Rptr. 865, 537 P.2d 1225; Younger v. State Bar (1974) 12 Cal.3d 274, 113 Cal.Rptr. 829, 522 P.2d 5; Hildebrand v. State Bar (1950) 36 Cal.2d 504, 523-524, 225 P.2d 508 (Traynor, J., concurring).

But the prohibition is not absolute. The California Bar and the California Supreme Court have long recognized, as stated by former California Chief Justice Traynor in his concurring opinion in

in Hildebrand, supra, that "[t]here are situations, however, when an attorney's association with a lay organization fulfills a legitimate interest of the organization or its members, and presents no risk of conflicting interests or other abuses." 36 Cal.2d, at p. 524.

Thus, California's Rules of Professional Conduct have been consciously framed so as to permit the activities referred to by Justice Traynor and, at the same time, prohibit activities that involve risk of harm to the public. For example, the rules have not only permitted, but also fostered the development of lawyer reference services (rule 2-104(C)), group legal services (rule 2-104(D)), prepaid legal services (rule 2-104(E)) and legal aid programs (rule 2-104(F)). California rule 2-104(F), which is particularly

relevant to the Smith case now before this Court, expressly provides, in pertinent part, as follows:

"The participation of a member of the State Bar in a legal aid plan or program for the furnishing of services to indigents or pursuant to the plan or program of a non-profit organization formed for charitable or other public purposes which furnishes legal services to persons only in respect of their civic or political or constitutional rights and not otherwise in furtherance of such charitable or other public purposes of such organization, and the publicizing of such plans or programs are not, of themselves, violations of these Rules of Professional Conduct provided the name of such member of the State Bar is not publicized."

(Emp. added.)

This Court has itself recognized the important distinction between activities which benefit the public and situations that present risk of harm to the public.

In a series of four landmark decisions, the Court clearly established

that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." United Transportation Union v. State Bar of Michigan (1971) 401 U.S. 576, 585, 91 S.Ct. 1076, 1082 [hereinafter "United Transportation Union"]; see United Mine Workers of America v. Illinois State Bar Association (1967) 389 U.S. 217, 88 S.Ct. 353 [hereinafter "United Mine Workers"]; Brotherhood of Railroad Trainmen v. Virginia (1964) 377 U.S. 1, 84 S.Ct. 1113 [hereinafter "Railroad Trainmen"]; National Association for the Advancement of Colored People v. Button (1963) 371 U.S. 415, 83 S.Ct. 328 [hereinafter "NAACP"].

In doing so, however, this Court did not invalidate the fundamental prohibition against attorneys soliciting professional

employment for their own purposes. Instead, the Court recognized a distinction between solicitation and the activities involved in the cases, and held that the prohibition against solicitation could not be applied so as to prohibit collective activity undertaken to obtain meaningful access to the courts. See, e.g., United Mine Workers, 389 U.S., at pp. 222-223, 88 S.Ct., at pp. 356-357; Railroad Trainmen, 377 U.S., at pp. 6-7, 84 S.Ct., at pp. 1116-1117; NAACP, 371 U.S., at pp. 439-444; 83 S.Ct., at pp. 341-343.

Thus, constitutionally protected activity constitutes an exception to the prohibition against solicitation; the exception coexists with the prohibition.

C. Purposes of This Brief

It is significant that in proposing amendments to California's Rules of Professional Conduct so as to permit advertising by lawyers, the California Bar has not

eliminated either (a) the fundamental prohibition against solicitation in situations that present risk of harm to the public or (b) the express recognition of constitutionally-protected activity embodied in present rule 2-104(F).

The California Bar believes that the two are distinguishable -- that the competing interests can be accommodated in such a way as to recognize constitutionally-protected activity while, at the same time, prohibiting activity which presents risk of harm to the public.

Should this Court choose to decide the Smith case on the present state of the record, the California Bar respectfully urges the Court to continue to be cognizant of the vital distinction between the apparently constitutionally-protected activity involved herein and the solicitation by the attorney for his own purposes

involved in the Ohralik case (Docket No. 76-1560).

But because the Supreme Court of South Carolina (hereinafter "South Carolina Supreme Court") did not engage in the requisite consideration of First Amendment interests, the Smith case is not ripe for decision by this Court and the California Bar also respectfully urges this Court to remand it to the South Carolina Supreme Court for such consideration in light of Bates.

DISCUSSION

- I. THIS CASE IS NOT RIPE FOR DECISION BY THIS COURT. IT WAS DECIDED BY THE SOUTH CAROLINA SUPREME COURT BEFORE THIS COURT'S DECISION IN BATES, AND THE SOUTH CAROLINA SUPREME COURT FAILED TO CAREFULLY CONSIDER THE FIRST AMENDMENT CLAIM ASSERTED BY SMITH. CONSEQUENTLY, THE CASE SHOULD BE REMANDED FOR SUCH CONSIDERATION.

This Court held in Bigelow v. Virginia (1975) 421 U.S. 809, 95 S.Ct. 2222, that commercial speech was entitled to certain protection under the First Amendment. In doing so, the Court noted as follows (421 U.S., at p. 826):

"The Court has stated that 'a State cannot foreclose the exercise of constitutional rights by mere labels.' NAACP v. Button, 371 U.S., at 429. Regardless of the particular label asserted by the State - whether it calls speech 'commercial' or 'commercial advertising' or 'solicitation' - a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation."

(Emp. added.)

But that is precisely what happened in this case. Labeling Smith's conduct as "solicit[ation]. . . on behalf of the ACLU"

(233 S.E.2d, at p. 303), the Supreme Court of South Carolina escaped the difficult task of assessing the First Amendment interests at stake in the case and weighing them against the public interest served by the ban on solicitation of professional employment by lawyers. The state court thus wholly failed to undertake the careful consideration and deliberate constitutional balancing directed by this Court in Bigelow.

The published per curiam opinion of the Supreme Court of South Carolina contains no discussion whatsoever by the court of Smith's First Amendment claims (268 S.C. 259, 233 S.E.2d 301, Juris.Stmt., at pp. 1a-14a). Instead, the state court simply quoted portions of the report of the Hearing Panel of the South Carolina Board of Commissioners on Grievances and Discipline (268 S.C. 259, 233 S.E.2d, at p. 302; Juris.Stmt., at pp.2a-3a).

The hearing panel likewise failed to carefully consider the First Amendment issues raised by Smith. Its entire discussion of Smith's First Amendment claims was embodied in the following five paragraphs (268 S.C. 259, 233 S.E.2d, at pp. 305-306[7], Juris.Stmt., at pp. 11a-14a):

"The final query then is was the solicitation protected under the First and Fourteenth Amendments, as earnestly urged by respondent. DR 2-103(D)(5) specifically recognizes the inherent constitutional problems and provides for the same by allowing an attorney to cooperate with the legal service activities of a "non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only in those instances, and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities, and only if the following conditions, unless prohibited by such interpretation, are met. . . ." Thus, DR 2-103(D)(5) prohibits solicitation except where controlling constitutional interpretations mandate the allowance of the specific service.
[Emp. in original.]

Furthermore, in order for an attorney to solicit on behalf of a non-profit organization, the four conditions of DR 2-103(D)(5)(a-d) must be met unless application of these four conditions has, jointly or severally, been prohibited by controlling constitutional interpretations.

"The first of the above mentioned four conditions is that "[t]he primary purposes of [non-profit] organizations do not include the rendition of legal services." The ACLU, the non-profit organization herein involved, by its own admission, may have several thousand lawsuits in progress at any one day and they classify themselves as private attorneys general. It follows, therefore, that its primary purpose is the rendition of legal services. This Panel has not found, nor has it been furnished with, any case showing that a state is prohibited, on constitutional grounds, from regulating the activities of attorneys' soliciting clients on behalf of a non-profit organization which has as one of its primary purposes the rendition of legal services. Respondent relies on four cases: NAACP v. Button, supra, 371 U.S. 415, 9 L.Ed.(2d) 405, 83 S.Ct. 328; Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 12 L.Ed(2d) 89, 84 S.Ct. 1113; United Mine Workers v. Illinois Bar Association, 389 U.S. 217, 19 L.Ed.(2d) 426, 88 S.Ct. 353 and United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 28 L.Ed.(2d) 339, 91 S.Ct. 1076. None of the four non-profit organizations involved in

the above cases, has as one of its primary purposes, the rendition of legal services. In NAACP v. Button, the court addresses itself to the legal services rendered by the NAACP. However, the court appears to characterize the NAACP as a political, rather than legal organization, and depicts litigation as an adjunct to the overriding political aims of the organization.

"That the American Bar Association considered the aspect of the NAACP case is obvious from the fact that the second of the above conditions allows solicitation where "the recommending, furnishing, or paying for legal services to its members is incidental and reasonably related to the primary purposes of such organization." As pointed out litigation is the primary purpose of the ACLU; it is not simply incidental to its primary purpose. This condition is not constitutionally prohibited, but is rather constitutionally required by NAACP v. Button.

"In that there is no question but that respondent has not violated the second and third conditions of DR 2-103(D)(5), there is no need to question whether they are constitutionally prohibited or not.

"Respondent has, therefore, violated DR 2-103(D)(5)(a) by attempting to solicit a client for a non-profit organization which, as its primary purpose, renders legal services, where respondent's associate is a staff counsel for the non-profit

organization. If respondent's contention that her actions were protected by the First and Fourteenth Amendments of the Constitution were upheld, it would amount to a holding that the pertinent provision of Canon 2 of the Code of Professional Responsibility was unconstitutional, which we are not prepared to do."

(Emp. added)

This is not the careful balancing of competing interests that this Court called for in Bigelow. It is merely a determination that Smith's conduct violated the rule and a statement of the hearing panel's unwillingness to vindicate Smith's First Amendment claims at the expense of the rule.

The hearing panel apparently did not even consider the possibility that the rule itself might be, at the same time, constitutional on its face but unconstitutionally applied to Smith's conduct. (See, e.g., Bates v. State Bar of Arizona (1977) ___ U.S. ___, 97 S.Ct. 2691; Jacoby v. State Bar (1977) 19 Cal.3d 359, 138 Cal.Rptr. 77, 562 P.2d 1326.) (One reason for this failing

may be that the hearing panel filed its report on October 6, 1975 (App., at p. iii) -- before this Court handed down its decisions in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. (May 24, 1976) 425 U.S. 748, 96 S.Ct. 1817, and Bates v. State Bar of Arizona (June 27, 1977) ___ U.S. ___ 97 S.Ct. 2691.)

For whatever reason, it is patently clear that neither the hearing panel nor the Supreme Court of South Carolina carefully considered and balanced the competing interests involved in this case.

The California Bar respectfully submits that the case should be remanded to the Supreme Court of South Carolina for the assessment and weighing directed in Bigelow, particularly in light of this

Court's recent decision in Bates.*

* This Court should not undertake the requisite balancing itself because the record does not adequately reveal the competing interests and only the Supreme Court of South Carolina is in a position to direct such further proceedings as may be necessary to fully develop the nature and extent of the individual, consumer and public interests involved.

The confused state of the record is well illustrated by the differing facts found by the hearing panel and summarized by the parties in their pleadings before this Court. For the convenience of the Court, these three versions of the facts are tabulated side-by-side in Appendix C, infra.

II. IF THIS COURT NONETHELESS CHOOSES TO DECIDE THIS CASE IN ITS PRESENT POSTURE, IT SHOULD CLEARLY DISTINGUISH THE CONDUCT INVOLVED HEREIN FROM THE SOLICITATION INVOLVED IN THE OHRALIK CASE AND THUS PRESERVE THE BAN ON AMBULANCE CHASING AND DIRECT SOLICITATION BY ATTORNEYS FOR THEIR OWN PURPOSES

While the facts in this case are far from clear (see, supra, fn.* at p. 20; infra, Appendix C), the hearing panel concluded that (268 S.C. 259, 233 S.E.2d, at p. 303; Juris.Stmt., at p. 6a):

"The evidence is inconclusive as to whether the respondent solicited Mrs. Williams on her own behalf, but she did solicit Mrs. Williams on behalf of the ACLU, which would benefit financially in the event of successful prosecution of the suit for money damages."

If the conclusion that the solicitation was "on behalf of the ACLU" is factually correct (see Smith's version of the facts, infra, Appendix C), the solicitation would appear to be constitutionally protected.

In a series of four landmark decisions, this Court clearly established that "collec-

tive activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment."

United Transportation Union v. State Bar of Michigan (1971) 401 U.S. 576, 585, 91 S.Ct. 1076, 1082; see United Mine Workers of America v. Illinois State Bar Association (1967) 389 U.S. 217, 88 S.Ct. 353; Brotherhood of Railroad Trainmen v. Virginia (1964) 377 U.S. 1, 84 S.Ct. 1113; National Association for the Advancement of Colored People v. Button (1963) 371 U.S. 415, 83 S.Ct. 328.

Responding to these cases, the American Bar Association initially amended its Code of Professional Responsibility to permit lawyers to cooperate with the legal service activities of any nonprofit organization that recommends, furnishes or pays for legal services to its members or beneficiaries,

"but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities. . . ."

ABA DR 2-103(D)(5). This version of the rule is still in effect in South Carolina.*

This South Carolina rule gives the four landmark decisions of this Court the narrowest possible reading, prohibiting cooperation with all legal service activities of nonprofit organizations other than those specifically considered in the NAACP line

* The American Bar Association subsequently amended its Code of Professional Responsibility effective March 1, 1974 so as to delete the quoted restriction (see ABA DR 2-103(D)(4)), but the Supreme Court of South Carolina refused to adopt a similar amendment.

For the convenience of this Court, the South Carolina and current ABA rules are set forth alongside the comparable California rule in Appendix D, infra.

of cases. The rule may thus unduly chill First Amendment freedoms and not withstand constitutional scrutiny. (See, e.g., United Transportation Union v. State Bar of Michigan (1971) 401 U.S. 576, 579-580, 91 S.Ct. 1076; Bates v. State Bar of Arizona (1977) ___ U.S. ___, 97 S.Ct. 2691; see also Jacoby v. State Bar (1977) 19 Cal.3d 359, 138 Cal.Rptr. 77, 562 P.2d 1326.)

But this Court would not have to vitiate the fundamental prohibition against solicitation in order to vindicate the First Amendment rights of the ACLU in this case. Nor should it do so.

It is important to note that in the NAACP line of cases, this Court did not invalidate the rules prohibiting attorneys from soliciting professional employment for their own purposes, either directly

themselves or indirectly through lay intermediaries such as ambulance chasers. Instead, the Court recognized a distinction between solicitation and the activities involved in the four landmark cases, and held that the prohibition against solicitation could not be applied so as to prohibit collective activity undertaken to obtain meaningful access to the courts. See, e.g., United Mine Workers, 389 U.S., at pp. 222-223, 88 S.Ct., at pp. 356-357; Railroad Trainmen, 377 U.S., at pp. 6-7, 84 S.Ct., at pp. 1116-1117; NAACP, 371 U.S., at pp. 439-444; 83 S.Ct., at pp. 341-343.

Thus, constitutionally protected activity constitutes an exception to the prohibition against solicitation; the exception can coexist with the prohibition.

For example, the pertinent California Rule of Professional Conduct is dramatically

different from the South Carolina rule.* California's rule provides that "[t]he participation of a member of the State Bar . . . pursuant to the plan or program of a non-profit organization formed for charitable or other public purposes which furnishes legal services to persons only in respect of their civic or political or constitutional rights[**] . . . [is] not . . . [a violation] of these Rules of Professional Conduct." (Cal. Rules of Professional Conduct, rule 2-104(F).)

This California rule, which affords breathing room to the constitutional guarantees enunciated by this Court in the NAACP line of cases, coexists with a ban

* See, infra, Appendix D.

** The ACLU is such an organization. See NAACP, fn. 19, 371 U.S., at pp. 440-441; 83 S.Ct., at pp. 341-342.

on the solicitation of professional employment by lawyers for their own purposes. (Compare Cal. Rules of Professional Conduct, rule 2-101 with rule 2-104(F).)

California's rules thus protect certain collective activity undertaken to obtain meaningful access to the courts while, at the same time, prohibiting individual activity undertaken by attorneys for their own purposes.

The distinction is vital because the prohibition against solicitation protects the public from situations that present risks of undue influence, overreaching, misrepresentation and conflicts of interest between attorneys and the persons they seek to represent. See, e.g., Ohio State Bar Association v. Ohralik (1976) 48 Ohio St.2d 217, 357 N.E.2d 1097, prob.juris. noted May 24, 1977, sub nom. Ohralik v.

Ohio State Bar Association (U.S. Sup. Ct. Docket No. 76-1650); Geffen v. State Bar (1975) 14 Cal.3d 843, 122 Cal.Rptr. 865, 537 P.2d 1225; Younger v. State Bar (1974) 12 Cal.3d 274, 113 Cal.Rptr. 829, 522 P.2d 5; Hildebrand v. State Bar (1950) 36 Cal.2d 504, 523-524, 225 P.2d 508 (Traynor, Jr., concurring).

In California the Rule of Professional Conduct prohibiting solicitation by attorneys is complemented by a criminal misdemeanor statute enacted by the Legislature to prevent ambulance chasing. Cal. Bus. & Prof. Code, §§ 6150-6154; see Hutchins v. Municipal Court (1976) 61 Cal.App.3d 77, 132 Cal.Rptr. 158.

In the Hutchins case, a California Court of Appeal held that an attorney could be convicted of aiding and abetting and conspiring with certain lay persons acting

as runners or cappers in the solicitation of professional employment for the attorney. In doing so, the Court noted that (61 Cal. App.3d, at pp. 85-86):

"The legislative history of Business and Professions Code sections 6151 through 6154 goes back 45 years to the enactment of chapter 1043 of the Statutes of 1931. They were codified as article 9 of chapter 4 of the Business and Professions Code in 1939; a minor amendment not relevant here was made to sections 6151 and 6152 in 1963.

"The 1931 legislation was a reaction to scandalous conditions which became notorious in the late 1920's arising out of 'ambulance chasing' activities of lawyers, insurance adjusters, and claim agents. In 1929 and 1930, the State Bar created a committee on ambulance chasing and set up local administrative committees in various cities to undertake a complete investigation of such cases and to recommend discipline of attorneys under the State Bar Act for violation of the then recently adopted rules 2 and 3 of the Rules of Professional Conduct. [4 State Bar J. 160-161 (1930); 4 State Bar J., Pt. 2, 28 (1929); 5 State Bar J. 358 (1930); 5 State Bar J., Pt. 2, 33 (1930).]

"The local administrative committees investigated and made disciplinary recommendations in numerous cases. Meanwhile, the legislation which became chapter 1043 in the 1931 Legislature, Assembly Bill No. 319, was supported by the State Bar's committee on ambulance chasing. [6 State Bar J., Pt. 2, 33, 34 (1931).]

Upon its passage, the State Bar committee on ambulance chasing and the president of the State Bar expressed satisfaction that it would go far in helping to eliminate the problem of solicitation of business by members of the bar. [6 State Bar J. 166-167 (1931); 6 State Bar J., Pt. 2, 34 (1931).]

"Subsequent to the legislation, the local administrative committee in Los Angeles remained active, and cooperated with local prosecuting authorities in investigation of more ambulance chasing activities in the mid-1930's. [Biby, Ambulance Chasers (1935) 10 State Bar J. 42; Biby, Chasing Ambulance Chasers (1936) 11 State Bar J. 97.]

"Recently attention was again drawn to this problem by a series of articles in the Los Angeles Times in March 1974, alleging an ambulance chasing ring was operating at the Los Angeles County Medical Center. The State Bar has been involved in investigation of that problem. [State Bar Reports (Apr. 1974) page 1; State Bar

Reports (Oct. 1974) page 1.] According to the amicus brief submitted by the State Bar in this case, the Los Angeles County District Attorney and the Los Angeles City Attorney, at the suggestion and with the active cooperation of the State Bar, are now actively prosecuting attorneys involved in running and capping operations."

(Pertinent footnotes in brackets; other footnotes omitted.)

The importance of the fundamental prohibition against attorneys soliciting professional employment for their own purposes was underscored by the California Supreme Court just 24 days ago when it issued its opinion in Goldman v. State Bar (October 28, 1977) ___ Cal.3d ___ (Cal.Sup. Ct.L.A. Docket No. 30679). In suspending two attorneys for one year for multiple counts of solicitation for their own purposes, the California Supreme Court noted (fn. 8, at slip opinion p. 14):

"While petitioners' proceeding was pending before this court, the

United States Supreme Court in
Bates v. State Bar (1977) U.S.
[53 L.Ed.2d 810, 97 S.Ct. 2691]

held, on First Amendment grounds,
that the State Bar of Arizona may
not 'prevent the publication in a
newspaper of [its members'] truth-
ful advertisement concerning the
availability and terms of routine
legal services.' (Id., at p. .)

"That opinion, however, does not
hold that a proper state agency
cannot prohibit solicitation of the
kind involved in the petitioners'
case. The court stated that 'we,
of course, do not hold that advertising
by attorneys may not be regulated in
any way' (Id., at p.), and that
'there may be reasonable restrictions
on the time, place, and manner of
advertising.' (Id., at p. .)

"More significantly, the court
noted that it did not undertake to
'resolve the problems associated with
in-person solicitation of clients --
at the hospital room or the accident
site, or in any situation that breeds
undue influence -- by attorneys or
their agents or "runners." Activity
of that kind might well pose dangers
of overreaching and misrepresentation
not encountered in newspaper announce-
ment advertising.' (Id., at p. .)
Bates affords no relief for petitioners'
misconduct in this disciplinary pro-
ceeding. (Cf. Jacoby v. State Bar
(1977) 19 Cal.3d 359.)"

(Emp. added.)

If this Court chooses to decide the Smith
case in its present posture, the California
Bar respectfully urges that the conduct
involved herein be clearly distinguished
from the solicitation for personal motives
involved in the Ohralik case so that the
public may continue to be protected from
the risks of undue influence, overreaching,
misrepresentation and conflicts of interest
that are inherent in those situations in
which attorneys solicit professional employ-
ment for their own purposes.

As is shown above, constitutionally-pro-
tected activity can be distinguished and
protected without vitiating the fundamental
prohibition against solicitation. Not only
can it be -- it should be.

CONCLUSION

For the reasons briefly stated above, the California Bar respectfully urges this Court to remand this case so that the competing interests involved can be fully developed before the requisite constitutional balancing is undertaken. An inadequate record such as that involved herein is not solid ground upon which to undertake delicate constitutional balancing.

If the Court nonetheless chooses to decide the case on its merits, the California Bar most respectfully urges the Court to be cognizant of the important distinction between (1) collective activity undertaken to obtain meaningful access to the courts and (2) individual activity undertaken for purely personal motives. While people need access to the courts, they also need to be free from the risks of undue

influence, overreaching, misrepresentation and conflicts of interest that arise out of solicitations by attorneys solely for their own purposes.

Dated: November 21, 1977.

Respectfully submitted,

Herbert M. Rosenthal
Stuart A. Forsyth

Attorneys For Amicus Curiae
The State Bar of California

APPENDIX

PROPOSED REVISIONS TO CALIFORNIA'S RULES OF PROFESSIONAL CONDUCT

Submitted by the Board
To the California Supreme Court
on September 17, 1976

Rule 2-101. General Prohibitions Against Solicitation of Professional Employment.

(A) A member of the State Bar shall not solicit professional employment. By way of example but without limiting the prohibition:

(1) A member of the State Bar shall not solicit professional employment in or about any prison or jail or other place of detention of persons, or the scene of any accident, or any hospital or sanitarium or other place of health care, or any court, or any public institution, or any public place, or any public street or highway, or any private institution or property of any character whatsoever, either personally or by use of any other person, firm, association, partnership, corporation or other entity or instrumentality acting on the member's behalf in any manner or in any capacity whatsoever.

(2) A member of the State Bar shall not solicit professional employment by compensating or giving or promising anything of value to a person or entity for the purpose of recommending or securing the member's employment by a client, or as a reward for having made a recommendation resulting in the member's employment by a client.

(3) A member of the State Bar shall not solicit professional employment by compensating or giving or promising anything of value to any representative of the press, radio, television or other communication medium in anticipation of or in return for publicity of the member or any other attorney.

(4) A member of the State Bar shall not solicit professional employment by recommending employment of the member or the member's partner or associate to a non-lawyer who has not sought the member's advice regarding employment of a member of the State Bar.

(5) A member of the State Bar shall not solicit professional employment by advertisement or other means of commercial publicity nor shall the member authorize or permit others to do so in the member's behalf.

APPENDIX A

(B) A member of the State Bar shall not accept employment when the member knows or should know that the person who seeks the member's services does so as a result of conduct prohibited under (A) of this rule.

(C) This rule does not prohibit the following identification of a member of the State Bar as such as well as by name and other reasonably pertinent data so long as such identification is not primarily directed to soliciting professional employment:

(1) In political advertisements;

(2) In public communications when the name and profession of a member of the State Bar are required or authorized by law or are reasonably pertinent for a purpose other than for the solicitation of potential clients;

(3) In or on legal documents prepared by the member of the State Bar;

(4) In routine reports and announcements of a bona fide business, civic, professional or political organization in which the member serves as a director or officer or other official capacity; and

(5) In or on articles, books, treatises, pamphlets, brochures or other such publications and in advertisements thereof.

Rule 2-102. Public Information Communications.

(A) A member of the State Bar may participate in the publication of any of the information about the member or the member's firm specified in (B)(3) of this rule in any of the following:

(1) Law lists and legal directories approved by the Board of Governors pursuant to the following criteria:

(a) The information published therein is substantially in the form and language specified in (B)(3) of this rule.

(b) Each such law list or legal directory is a separate collation which includes a reasonable number of attorneys (from different sole law practices, law partnerships, professional associations of attorneys practicing law together or law corporations), considering the size of the legal community and the field or fields of law involved, listed together under the title "Attorneys" or "Lawyers" and under such additional subclassifications (including, but not limited to, geo-

graphical areas in which members reside or maintain offices or regularly practice, fields of law or certified specialties) as are not likely to be misleading or injurious to the public or the profession.

(c) Preferential prominence is not given to any member listed therein, by different size or character of type, underscoring or any other method used for emphasis or to attract attention.

(d) The information itself and the manner in which the information is presented or distributed (i) are not false, fraudulent, misleading, deceptive or unfair, (ii) are not likely to mislead or deceive, whether because in context they make only a partial disclosure of variables and relevant facts, or for other reasons, (iii) do not contain laudatory statements about the member or the member's firm, (iv) are not intended or likely to create false or unjustified expectations of favorable results, (v) do not convey the impression that the member or the member's firm is in a position to influence improperly any court, tribunal or other public body or official, (vi) are not intended or likely to encourage a legal action or position being taken or asserted primarily to harass or maliciously injure another, (vii) are not intended or likely to appeal primarily to a person's fears, greed, desires for revenge or similar emotions, (viii) do not contain representations or implications that are likely to deceive or to cause misunderstanding, and (ix) are not for the primary purpose of obtaining professional employment of a particular member or member's firm for a specific matter or transaction.

(e) The law list or legal directory is published no more frequently than once quarterly.

(f) The law list or legal directory contains such explanatory information as the Board of Governors may prescribe from time to time for the protection of persons to whom the communications are addressed.

(g) The law list or legal directory clearly specifies for what period of time the information contained therein will be in effect.

(h) Law lists or legal directories may be published or distributed by commercial publishers of law lists or legal directories; bar associations; newspaper publishers; publishers of telephone directories; service clubs; charitable organizations; consumer organizations; labor unions; business, professional or trade

associations; and entities enumerated in Rule 2-104, provided the person or entity publishing the law list or legal directory files with the State Bar a certification that it will not arbitrarily, capriciously or unreasonably exclude any member of the State Bar from its law list or legal directory.

A member shall not participate in the publication of information about the member or the member's firm in any law list or legal directory which the member knows or should know does not comply with the requirements of this rule and has not been approved by the Board of Governors or has been subsequently disapproved by the Board of Governors. Applications for approval of law lists and legal directories shall be made on such forms and pursuant to such rules as adopted and as from time to time amended by the Board of Governors.

(2) Classified sections of the telephone directory or directories for the geographical area or areas in which the member of the State Bar resides or maintains offices or regularly practices law, provided:

(a) All listings of members and members' firms therein are in a separate collation listed together under the title "Attorneys" or "Lawyers" and, if under subclassifications, are only arranged according to fields of law in which the member or the member's firm concentrates, primarily engages, or will accept cases, or in which the member is a certified specialist.

(b) The information permitted in (B)(3) of this rule is presented in substantially the form and language set forth therein.

(c) Introductory paragraphs or footnotes include such explanatory information as the Board of Governors may prescribe from time to time for the protection of persons to whom the communications are addressed.

(d) The presentation of the information does not violate the provisions of (1)(c) or (d) of (A) of this rule.

(3) Law lists or legal directories published periodically by the State Bar.

As used herein, "fields of law" includes, but is not limited to, administrative agency law, admiralty or maritime law, antitrust law, (field(s) of) appellate practice, bankruptcy law, business law, (field(s) of) civil practice, civil rights law, condemnation law, contract law, copyright law,

corporation and partnership law, creditor's rights law, criminal law, debtor's rights law, education law, employment law, entertainment law, environmental law, estate planning, family law, general practice, immigration and naturalization law, juvenile law, labor law, landlord and tenant law, (field(s) of) malpractice law, patent law, pension and profit sharing law, personal injury law, probate law, real estate law, senior citizens law, social security law, taxation law, trademark law, (field(s) of) trial practice, trust law, unemployment insurance law, veterans law, welfare law, worker's compensation law, zoning law.

(B) A member of the State Bar may participate in the publication of any of the information about the member or the member's firm specified in paragraph (3) of this subdivision to the extent permitted in (A) of this rule and in Rules 2-103 and 2-104, provided:

(1) Both the information itself and the manner in which the information is presented or distributed (a) are not false, fraudulent, misleading, deceptive or unfair, (b) are not likely to mislead or deceive, whether because in context they make only a partial disclosure of variables and relevant facts, or for other reasons, (c) do not contain laudatory statements about the member or the member's firm, (d) are not intended or likely to create false or unjustified expectations of favorable results, (e) do not convey the impression that the member or the member's firm is in a position to influence improperly any court, tribunal or other public body or official, (f) are not intended or likely to encourage a legal action or position being taken or asserted primarily to harass or maliciously injure another, (g) are not intended or likely to appeal primarily to a person's fears, greed, desires for revenge or similar emotions, (h) do not contain representations or implications that are likely to deceive or to cause misunderstanding, and (i) are not for the primary purpose of obtaining professional employment of a particular member or member's firm for a specific matter or transaction.

(2) Only members who hold a current certificate as a specialist issued by the California Board of Legal Specialization pursuant to a plan for specialization approved by the Board of Governors may use the terms "certified specialist", "specialist", "specialty", "specializes" or "specializing" in describing themselves or the nature of their practice; and only members who are registered to practice in patent matters before the United States

Patent and Trademark Office may use the words "patent" or "patents" in describing themselves or the nature of their practice.

(3) Such information is presented in substantially the following form and language:

(a) Name of the member of the State Bar;

Form: "[name of member]"

(b) Name under which the member practices, which may be accompanied by a statement clarifying that the practice is (i) a sole practice, (ii) a law partnership, (iii) an association of attorneys or (iv) a public interest law firm which has been ruled exempt from federal income tax under the Internal Revenue Code; provided that if the name under which the member practices is a law corporation, the statement clarifying that the practice is a law corporation shall be given and shall comply with the provisions of section 6164 of the Business and Professions Code;

Form: "[name of member's firm, e.g. 'Legal Clinic of Doe and Roe', 'Doe and Roe, Lawyers'], ['a sole practitioner' or 'a law partnership' or 'an association of attorneys' or 'a law corporation' or 'public interest law firm']"

(c) The name(s) of predecessor law firm(s) in a continuing line of succession;

Form: "formerly: [name(s) of predecessor law firm(s) listed in reverse chronological order]"

(d) Address(es) and telephone number(s) of the office(s) maintained by the member or the member's firm for the practice of law;

Form: "[address(es)], [telephone number(s)]"

(e) Office hours regularly maintained by the member or the member's firm for the practice of law, and a statement that the member is available to meet with clients or potential clients at times other than the specified office hours;

Form: "office hours: [days and hours regularly maintained], [and/or 'by appointment']; [telephone answered:] [days and hours regularly answered or '24 hours']"

(f) A statement that the member is (or is not) willing to meet with potential clients at locations other than the member's office(s);

Form: "interviews ['not'] limited to office(s)"

(g) Language(s) other than English spoken fluently by the member;

Form: "fluent in: [name(s) of language(s)]"

(h) Language(s) other than English for which the member or the member's firm provides interpreter(s), and a statement whether such interpreter(s) are provided without charge;

Form: "[['free'] [name(s) of language(s)] interpreter(s) provided]"

(i) Cost of an initial interview for a specified period of time, or a statement that such interview for a specified period of time is without charge;

Form: "initial interview: ['½ hour' or '1 hour' or other specified period of time], [dollar amount or 'free']"

(j) A statement that the member or the member's firm does (or does not) provide a written fee schedule, and if such fee schedule is provided a statement whether such fee schedule is provided without charge;

Form: "[['free'] written fee schedule available]"

(k) A statement that the member or the member's firm is (or is not) willing to provide written fee estimates for specific services prior to providing such services, and if such fee estimates are provided a statement whether such fee estimates are provided without charge;

Form: "[['free'] written fee estimates given]"

(l) Field(s) of law practiced by the member or the member's firm in which fees are set by statute;

Form: "[[field(s) of law] fees set by statute]"

(m) Hourly fee(s) or range of hourly fee(s) charged by the member or the member's firm, *together with* all of the variables and other relevant factors that could affect the amount(s) of the stated fee(s);

Form: "[[hourly fee(s), together with all variables and relevant factors]: [dollar amount(s)]"

(n) Fee(s) or range(s) of fee(s) charged by the member or the member's firm for specific types of services, *together with* all of the variables and other relevant factors that could affect the amounts of the stated fee(s);

Form: "[type(s) of service(s), together with all variables and relevant factors]: [dollar amount(s)]"

(o) Type(s) of case(s) that the member or the member's firm is willing to accept on a contingency fee basis, *together with* the terms of a typical contingency fee contract (including, without limitation, how both investigation costs and litigation costs are computed and paid) *and* all of the variables and other relevant factors that could affect the stated terms;

Form: "contingency fee case(s): [type(s) of case(s)], [terms of contingency fee contract(s), together with all variables and relevant factors]"

(p) Name(s) of credit card(s) accepted by the member or the member's firm in payment of fees (or a statement that credit cards are not accepted);

Form: "[name(s) of credit card(s)] accepted"

(q) A statement that the member or the member's firm regularly accepts (or does not regularly accept) installment payments of fees on mutually satisfactory terms;

Form: "installment payments accepted on mutually satisfactory terms"

(r) A statement that the member or the member's firm is (or is not) willing to submit any fee dispute(s) to arbitration, and if so willing a statement that such arbitration is or is not binding;

Form: "fee disputes submitted to [binding] arbitration"

(s) A statement that the member holds current certificate(s) as a specialist issued by the California Board of Legal Specialization pursuant to a plan for specialization approved by the Board of Governors;

Form: "certified specialist in [field(s) of law]"

(t) A statement that the member is registered to practice in patent matters before the United States Patent and Trademark Office;

Form: "patents" or "patent law" or "registered to practice in patent matters"

(u) Field(s) of law to which the member and/or member's firm limits the member's and/or firm practice;

Form: "[lawyer's] [firm's] practice limited to: [field(s) of law]"

(v) One or more fields of law in which the member or the member's firm concentrates or primarily engages (not to exceed (i) in the case of a member, three, and (ii) in the case of a firm, three per member or ten, whichever is less);

Form: "[lawyer' or 'firm'] ['concentrates in:' or 'primarily engages in:'] [field(s) of law]"

(w) One or more fields of law in which the member or the member's firm accepts cases, *together with* the information set forth in (v) above;

Form: "[lawyer' or 'firm'] ['concentrates in:' or 'primarily engages in:'] [field(s) of law] and accepts cases in: [field(s) of law]"

(x) A statement that the member or the member's firm is interested in providing professional services under group legal services plan(s) which the member or the member's firm does not actually serve;

Form: "interested in serving group plans"

(y) A statement that the member or the member's firm is interested in providing professional services under prepaid legal services plan(s) which the member or the member's firm does not actually serve;

Form: "interested in serving prepaid plans"

(z) One or more fields of law in which the member and/or the member's firm will not accept cases;

Form: "[lawyer'] [firm'] will *not* accept cases in: [field(s) of law]"

(aa) Number of active members of the State Bar (including the member) who are associated with the member or the member's firm in the practice of law on a substantially full-time basis;

Form: "number of California lawyers: [whole number]"

(bb) Name(s) of (i) active member(s) of the State Bar who are, (ii) deceased member(s) of the State Bar who have been and (iii) with their consent, living member(s) of the State Bar who have been, associated with the member or the member's firm in the practice of law, and a statement with regard to each, that he or she is or was (i) a full-time partner, (ii) a full-time associate or (iii) has a continuing relationship with the member or the member's firm other than as a full-time partner or a full-time associate

("of counsel"), *together with* the pertinent dates with regard to any such member who is not currently associated with the member or the member's firm in the practice of law;

Form: "[partner(s):] [name(s) and, if applicable, dates of former association in years]; [associate(s):] [name(s) and, if applicable, dates of former association in years]; [of counsel:] [name(s) and, if applicable, dates of former association in years]"

(cc) Date and place of the member's birth;

Form: "born: [date, place]"

(dd) State(s) and federal court(s) in which the member is entitled to practice law, *together with* the date(s) of admission to such practice;

Form: "admitted to practice in: [state, year]; [state, year]; [name of federal court, year]; [name of federal court, year]; [etc.]"

(ee) Name(s) of other professional license(s) currently or formerly held by the member, *together with* the state(s) issuing the license(s) and the pertinent dates;

Form: "other license(s): [official title or abbreviation of license(s) *currently* held], [state(s) of issuance], [first year of member's continuous holding of the license(s)] '-present'; [official title or abbreviation of license(s) *formerly* held], [state(s) of issuance], [dates in years that license(s) were held]"

(ff) Name(s) of school(s) from which the member has graduated, and with regard to each such school, a statement describing the nature of the school, the date the member graduated, the degree(s) the member received and any scholastic distinction(s) the member received;

Form: "[college' or 'law school' or 'engineering school' or other appropriate description of the nature of the school attended by the member]: [name of school, year of graduation, degree(s) received, official name or abbreviation of scholastic distinction(s) received]"

(gg) Official title(s) of public or quasi-public office(s) or post(s) of honor currently or formerly held by the member, *together with* the pertinent dates;

Form: "[official title or abbreviation of office(s) or post(s) of honor *currently* held], [year member's current term began] '-present'; [official title or abbreviation of office(s) or post(s) of honor *formerly* held], [dates in years that office or post was held]"

(hh) Name(s) of the branch(es) of the armed forces of the United States in which the member served, and the pertinent dates of such service;

Form: "[name(s) of branch(es)], [dates of service in years]"

(ii) Publication(s) authored by the member;

Form: "author: [title of work authored, title of publication, date of publication]"

(jj) Teaching position(s) currently or formerly held by the member, *together with* the pertinent dates;

Form: "[official title or abbreviation of position *currently* held], [name of school], [first year of member's continuous service in position] '-present'; [official title or abbreviation of position *formerly* held], [name of school], [dates in years that position was held]"

(kk) Name(s) of organization(s) or component(s) thereof to which the member belongs or belonged, and the pertinent dates of such membership;

Form: "member: [official name(s) or abbreviation(s) of organization(s) to which the member *currently* belongs], [first year of member's continuous membership therein] '-present'; [official name(s) or abbreviation(s) of component(s) of organization(s) to which the member *currently* belongs], [first year of member's continuous membership therein] '-present'; [official name(s) or abbreviation(s) of organization(s) to which the member *formerly* belonged], [dates of membership in years]; [official name(s) or abbreviation(s) of component(s) of organization(s) to which the member *formerly* belonged], [dates of membership in years]"

(ll) Name(s) of position(s) of responsibility currently or formerly held by the member in organization(s), *together with* the pertinent dates;

Form: "[official name(s) or abbreviation(s) of position(s) *currently* held] [first year of member's continuous service in position(s)] '-present'; [official

name(s) or abbreviation(s) of position(s) *formerly held*], [dates in years that position was held]"

(C) In addition to the conduct permitted by this rule, members of the State Bar and law firms may continue to be listed in a telephone directory, community directory or guide, law list or legal directory, or in a membership roster, membership register, membership directory or other membership list of a service club, charitable organization, fraternity, school alumni association or business, professional or trade association to which the member belongs, in the manner previously permitted by Rules 2-103(A)(5), (6) and (7) and 2-106(4) of the Rules of Professional Conduct extant immediately prior to effective date of this rule.

Rule 2-103. Professional Announcements, Door and Office Signs, Professional Cards, Letterheads and Trade Names.

Only to the extent permitted in this rule:

(A) A member of the State Bar available to act as a consultant to or as an associate of other members of the State Bar may distribute to other members of the State Bar and publish in legal journals circulated or distributed primarily to members of the State Bar or lawyers licensed in other jurisdictions an announcement in modest and dignified form of such availability setting forth any of the information permitted in Rule 2-102(B)(3) in substantially the form and language set forth therein.

(B) A member of the State Bar or a member's law firm may mail to lawyers, clients, former clients, personal friends and relatives a brief professional announcement card in modest and dignified form stating new or changed associations or addresses, change of firm name, or similar matters, pertaining to the professional office of the member or of the member's firm and any of the information permitted in Rule 2-102(B)(3) in substantially the form and language set forth therein. The announcement may be distributed only once for any new or changed association or address, change of firm name, or similar matters.

(C) A member of the State Bar or a member's law firm may have a sign in modest and dignified form on or near the door of the member's or firm's law office and in the building directory identifying the law office. The sign may state the nature of the practice only to the extent permitted under Rule 2-102(B)(3)(s), (t), (u) or (v) in substantially the form and language set forth therein.

(D) A member of the State Bar or a member's law firm may use a professional card in modest and dignified form and only for the purpose of identification. The professional card of a member may identify the member by name as a lawyer and give the member's address(es), telephone number(s) and give the name of the member's law firm in substantially the form and language set forth in Rule 2-102(B)(3)(b). The professional card of a law firm may give its name in substantially the form and language set forth in Rule 2-102(B)(3)(b) and may also give the names of members and associates. The card may state the nature of the practice only to the extent permitted under Rule 2-102(B)(3)(s), (t), (u) or (v) in substantially the form and language set forth therein.

(E) A member of the State Bar or a member's law firm may use stationery with a professional letterhead in modest and dignified form. The letterhead of a member may identify the member by name and as a lawyer and give the member's address(es), telephone number(s), the name of the member's law firm in substantially the form and language set forth in Rule 2-102(B)(3)(b) and the names of members and associates thereof. A letterhead of a law firm may give its name in substantially the form and language set forth in Rule 2-102(B)(3)(b) and may also give the names of members and associates, names and dates relating to deceased and retired members, and the names and dates of predecessor firms in a continuing line of succession. A member of the State Bar may be designated "of counsel" on a letterhead if the member has a continuing relationship with a lawyer or law firm other than as a full-time partner or associate. The letterhead may state the nature of the practice only to the extent permitted under Rule 2-102(B)(3)(s), (t), (u) or (v) in substantially the form and language set forth therein.

(F) A member of the State Bar who is engaged both in the practice of law and another profession or business shall not so indicate on his or her office sign, professional card or letterhead, nor shall the member identify himself or herself as a member of the State Bar in connection with the member's other profession or business.

(G) A member of the State Bar or a member's law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if the member or the firm devotes a substantial amount of professional time in the representation of that client, provided the member of the State Bar uses such letterhead only for

correspondence relating to the professional representation of the client the member represents as general counsel unless the member performs no legal services for anyone other than the client the member represents as general counsel.

(H) A member of the State Bar or a member's law firm may practice under a fictitious name, provided that such name (1) includes the member's name or the name(s) of other member(s) of the State Bar who are associated with the member or the member's firm in the practice of law or the name(s) of deceased or retired member(s) of the firm or of a predecessor firm in a continuing line of succession or the name of a partnership within the meaning of (I) of this rule or, in the case of a law corporation, complies with the provisions of section 6164 of the Business and Professions Code, (2) is not false, fraudulent, misleading, deceptive or unfair, (3) is not likely to mislead or deceive, (4) does not contain laudatory statements about the member or the member's firm, (5) is not intended or likely to create false or unjustified expectations of favorable results, (6) does not convey the impression that the member or the member's firm is in a position to influence improperly any court, tribunal or other public body or official, (7) is not intended or likely to result in a legal action or position being taken or asserted primarily to harass or maliciously injure another, (8) is not intended or likely to appeal primarily to a person's fears, greed, desires for revenge or similar emotions, and (9) does not contain representations or implications that are likely to deceive or to cause misunderstanding.

(I) A partnership may be formed or continued between or among lawyers licensed in different jurisdictions, provided all enumerations of the members and associates of the firm make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions, and further provided that (1) each person occupying each office of the firm located in California who shall hold himself or herself out as a member or associate of such firm shall be an active member of the State Bar and (2) each person holding himself or herself out as a member of the firm shall be a bona fide partner in such firm, with a bona fide share in the profits, liabilities and professional responsibilities thereof and (3) at least one person occupying each office of the firm located in California shall be such a bona fide partner and an active member of the State Bar.

Rule 2-104. Public, Group and Prepaid Legal Service Programs.

(A) The participation of a member of the State Bar in a legal aid plan or program for the furnishing of services to indigents or pursuant to the plan or program of a non-profit organization formed for charitable or other public purposes which furnishes legal services to persons only in respect to their civic or political or constitutional rights and not otherwise in furtherance of such charitable or other public purposes of such organization, and the publicizing of such plans or programs are not, of themselves, violations of these Rules of Professional Conduct provided the name of such member of the State Bar is not publicized. Nothing in this rule shall prohibit a representative of such a plan or program from stating in response to inquiries as to the identity of such member of the State Bar any of the information concerning the member permitted in Rule 2-102(B)(3) in substantially the form and language set forth therein.

(B) The participation of a member of the State Bar in a lawyer referral service established, sponsored, supervised and operated in conformity with the Minimum Standards for a Lawyer Referral Service in California, as adopted and as from time to time amended by the Board of Governors is not, of itself, a violation of these Rules of Professional Conduct provided the name of such member of the State Bar is not publicized. Nothing in this rule shall prohibit a representative of such lawyer referral service from identifying a member of the State Bar who is participating in that service, and stating any of the information concerning the member permitted in Rule 2-102(B)(3) in substantially the form and language set forth therein, in connection with the making of a requested referral in conformity with the said Minimum Standards. A member of the State Bar may permit his or her name to be listed in lawyer referral service offices according to the fields of law in which the member will accept referrals and in such manner as is proper under the standards which the Board of Governors may from time to time promulgate.

(C) The furnishing of legal services by a member of the State Bar pursuant to an arrangement for the provision of such services to the individual member of a group, as herein defined, at the request of such group, is not of itself in violation of these Rules of Professional Conduct if the arrangement:

(1) permits any member of the group to obtain legal services independently of the arrangement from any attorney of his or her choice,

(2) is so administered and operated as to prevent

(a) such group, its agents or any member thereof from interfering with or controlling the performance of the duties of such member of the State Bar to the member's client,

(b) such group, its agents or any member thereof from directly or indirectly deriving a profit from or receiving any part of the consideration paid to the member of the State Bar for the rendering of legal services thereunder,

(c) unlicensed persons from practicing law thereunder, and

(d) all publicizing and soliciting activities concerning the arrangement except by means of simple, dignified announcements setting forth the purposes and activities of the group or the nature and extent of the legal services or both, without any identification of the member or members of the State Bar rendering or to render such services.

Nothing in this rule shall prohibit a statement in communications to persons entitled to receive legal services under the arrangement or in response to individual inquiries as to the identity of the member or members of the State Bar rendering or to render the services giving any of the information concerning the member or members permitted in Rule 2-102(B)(3) in substantially the form and language set forth therein.

As used in this rule, a group means a professional association, trade association, labor union or other non-profit organization or combination of persons, incorporated or otherwise and including employees of a single employer, whose primary purpose and activities are other than the rendering of legal services.

A member of the State Bar furnishing legal services pursuant to an arrangement for the provision thereof shall advise the State Bar thereof within 60 days after entering into the same. Thereafter the member shall advise the State Bar, on forms provided by it, of the following matters: the name of the group, its address, whether it is incorporated, its primary purposes and activities, the number of its members and a general description of the types of legal

services offered pursuant to the arrangement. Annually on January 31, the member shall report to the State Bar, on forms provided by it, any changes in such matters, and the number of members of the group to whom legal services were rendered during the calendar year. Each report filed pursuant hereto and the information contained therein, except the name and address of the group, the fact that it has an arrangement for the provision of legal services and the names of members of the State Bar providing such services shall be confidential.

(D) Section a. The furnishing of legal services by a member of the State Bar pursuant to an arrangement for pre-paid legal services or other plan for defraying the costs of professional services of attorneys, is not of itself in violation of these Rules of Professional Conduct, if:

(1) the arrangement was established by or at the request of a group defined in Rule 2-104(C) of these rules for the individual members of the group and otherwise complies with Rule 2-104(C); or

(2) the arrangement is developed, administered and operated by a non-profit organization, incorporated or otherwise and

(a) permits any client to obtain legal services independently of the arrangement, from any attorney of his or her choice; and

(b) is so developed, administered and operated that

(i) the panel of attorneys furnishing legal services thereunder consists of at least 20% or 1000 of the active members of the State Bar engaged in private practice and maintaining their principal offices in the geographical area served by the arrangement, whichever is the lesser number, but in no event less than 15 such active members; and

(ii) the panel of attorneys furnishing the legal services thereunder is open to any active member of the State Bar engaged in practice in the geographical area served by the arrangement, provided that a panel of attorneys which is open to all of the members of a local bar association is deemed to comply with this requirement if membership in that bar association is open to any active member of the State Bar engaged in practice in said geographical area, and

(iii) the client shall have the right to select any attorney on the panel to perform the legal services provided that the attorney consents to perform the legal services, and

(iv) any referral of a client to an attorney or attorneys on the panel of attorneys furnishing legal services under the arrangement shall be at the request of the client and in a manner consistent with those provisions of the "Minimum Standards for a Lawyer Referral Service in California" respecting the making of referrals; and

(c) is so developed, administered and operated as to prevent

(i) a third party from interfering with or controlling the performance of duties of the member of the State Bar to the member's client, and

(ii) a third party from receiving any part of the consideration paid to the member of the State Bar for furnishing legal services thereunder except as permitted by Rules 2-108 and 3-102 of these rules, and

(iii) unlicensed persons from practicing law thereunder, and

(iv) all publicizing and soliciting activities concerning the arrangement except by means of simple, dignified announcements setting forth the purposes and activities of the non-profit organization or the nature and extent of the benefits pursuant to the arrangement or both, without any identification of the member or members of the State Bar rendering or to render legal services; provided that all such publicizing and soliciting activities are in good faith engaged in solely for the purpose of developing, administering or operating the arrangement, and not for the purpose of soliciting business for, or for the self-aggrandizement of, any specific member or members of the State Bar; provided further that all publicizing and soliciting activities concerning the arrangement, except publicizing activities directed at persons entitled to receive legal services under the arrangement, shall terminate at such time as the total number of persons entitled to receive legal services under all arrangements of which the State Bar is advised pursuant to Rule 2-104(C) of these rules

is equivalent to the total number of persons entitled to receive legal services under all arrangements reported to the State Bar pursuant to Section b.1. (b) of this Rule 2-104(D). For the purposes of this subsection (c)(iv) "persons" shall not include those who are eligible to receive legal services solely by reason of being a spouse or dependent family member.

Once the requirements of Section a.2.(b)(i) of this Rule 2-104(D) have been satisfied, nothing in this rule shall prohibit a statement in communications to persons entitled to receive legal services under the arrangement or in response to individual inquiries as to the identity of the member or members of the State Bar rendering or to render the services giving any of the information concerning the member or members permitted in Rule 2-102(B)(3) in substantially the form and language set forth therein.

As used in this section, "geographical area" means any one of the following: (1) the state; (2) one or more municipal court judicial districts; (3) any combination of one or more municipal court judicial districts together with one or more counties; (4) one or more counties; (5) one or more of the superior court districts in a county of 5,000,000 or more persons according to the latest federal census.

Section b. Subject to the provisions of Section c. of this Rule 2-104(D), a member of the State Bar who has agreed to furnish legal services pursuant to an arrangement for prepaid legal services or other plan for defraying the costs of professional services of attorneys, shall

(1) Within 60 days after entering into such agreement, file a notice thereof with the State Bar, and thereafter file with the State Bar, on the report forms provided by it and within 60 days after receiving such forms, the following under either (a) or (b), as applicable:

(a) If the arrangement was established by or at the request of a group pursuant to Section a.1. of this Rule 2-104(D):

(i) the name and office address of the group, the number of its members, its primary purposes and activities, and a copy of any agreement the member of the State Bar has entered into with the group respecting the arrangement;

(ii) if a person or entity other than the group itself is administering the arrangement, the name

and office address of such person or entity, whether such person or entity is incorporated, a copy of any agreement the member of the State Bar has entered into with such person or entity respecting the arrangement, and a copy of any agreement such person or entity has entered into with the group respecting the arrangement; and

(iii) a description of the methods and procedures under the agreement, if any, (A) whereby a client who is entitled to benefits under the arrangement may, upon request, be referred to an attorney or attorneys on the panel of attorneys furnishing legal services under the arrangement, (B) for periodically obtaining from those being served by the arrangement their comments, evaluations and recommendations respecting the operation of and furnishing of legal services under the arrangement, and (C) for resolution of client grievances.

(b) If the arrangement is developed, administered and operated by a non-profit organization pursuant to Section a.2. of this Rule 2-104(D):

(i) the name and office address of the non-profit organization and, if incorporated, a copy of its articles of incorporation and by-laws;

(ii) the geographical area served by the arrangement;

(iii) a copy of any agreement between the member of the State Bar and the non-profit organization respecting the arrangement;

(iv) the name and office address of any group being served by the arrangement, the number of its members, its primary purposes and activities, and a copy of any agreement the member of the State Bar or the non-profit organization, or both, has entered into with the group respecting the arrangement;

(v) if individuals, as distinguished from members of a group, are being served by the arrangement, then the number of such individuals and a copy of each form of agreement entered into between the non-profit organization and such individuals respecting the arrangement; and

(vi) a description of the methods and procedures under the arrangement, if any, as required under 1.(a)(iii) of this section.

(2) Annually thereafter, by January 31, file with the State Bar, on the report forms provided by it, the following: the number of persons to whom the member rendered legal services during the preceding calendar year pursuant to the arrangement, and the types of such services; and the changes, if any, in the information or documents the member filed with the State Bar under either 1.(a) or 1.(b) of this Section b.

Section c. Any notice, information or documents required to be filed by a member of the State Bar pursuant to Section b. of this Rule 2-104(D) need not be filed by such member personally if, within the time periods specified in that section, such notice, information or documents are filed on the member's behalf by either: (1) the group's officer, agent, or employee having primary responsibility for the arrangement established pursuant to Section a.1. of this Rule 2-104(D), or if such arrangement is being administered by a person or entity other than the group, by such person or entity; (2) the non-profit organization administering the arrangement pursuant to Section a.2. of this Rule 2-104(D).

When such notice, information or documents are so filed on behalf of two or more members of the State Bar for any one arrangement, they shall be consolidated where possible in a single notice or reporting form and documents already on file may be incorporated by reference so long as there are no changes therein.

Section d. Any notice, information or documents received by the State Bar pursuant to Sections b. or c. of this Rule 2-104(D) shall be public, whether or not also received by the State Bar pursuant to Rule 2-104(C) of these rules.

PROPOSED INTERIM

CALIFORNIA RULE OF PROFESSIONAL CONDUCT

Submitted by the Board
To the California Supreme Court
on August 17, 1977

Rule 2-101. General Prohibition Against Solicitation of Professional Employment; Use of Public Information Communications.

(A) A member of the State Bar shall not solicit professional employment by any means not permitted by these Rules. By way of example but without limiting the prohibition:

(1) A member of the State Bar shall not solicit professional employment in or about any prison or jail or other place of detention of persons, or the scene of any accident, or any hospital or sanitarium or other place of health care, or any court, or any public institution, or any public place, or any public street or highway, or any private institution or property of any character whatsoever, either personally or by use of any other person, firm, association, partnership, corporation or other entity or instrumentality acting on the member's behalf in any manner or in any capacity whatsoever.

(2) A member of the State Bar shall not solicit professional employment by compensating or giving or promising anything of value to a person or entity for the purpose of recommending or securing the member's employment by a client, or as a reward for having made a recommendation resulting in the member's employment by a client.

(3) A member of the State Bar shall not solicit professional employment by recommending employment of the member or the member's partner or associate to a non-lawyer who has not sought the member's advice regarding employment of a member of the State Bar.

(B) A member of the State Bar shall not accept employment when the member knows or should know that the person who seeks the member's services does so as a result of conduct prohibited under (A) of this rule.

(C) Publication of information about the member or the member's firm is permitted but only to the extent it complies with the following:

(1) Both the information itself and the manner in which the information is presented or distributed (a) are not false, fraudulent, misleading, deceptive or

APPENDIX B

unfair, (b) are not likely to mislead or deceive, whether because in context they make only a partial disclosure of variables and relevant facts, or for other reasons, (c) do not contain laudatory statements about the member or the member's firm, (d) are not intended or likely to create false or unjustified expectations of favorable results, (e) do not convey the impression that the member or the member's firm is in a position to influence improperly any court, tribunal or other public body or official, (f) are not intended or likely to encourage a legal action or position being taken or asserted primarily to harass or maliciously injure another, (g) are not intended or likely to appeal primarily to a person's fears, greed, desires for revenge or similar emotions, (h) do not contain representations or implications that are likely to deceive or to cause misunderstanding, (i) are not part of a solicitation of professional employment prohibited under (A) of this rule.

(2) Only members who hold a current certificate as a specialist issued by the California Board of Legal Specialization pursuant to a plan for specialization approved by the Board of Governors may use the terms "certified specialist," "specialist," "specialty," "specializes" or "specializing" in describing themselves or the nature of their practice; and only members who are registered to practice in patent matters before the United States Patent and Trademark Office may use the words "patent" or "patents" in describing themselves or the nature of their practice.

The member shall maintain, for one year, in his or her files, a true copy of any such publication pertaining to the member or the member's firm and shall, upon request, make said copy available to the State Bar.

(D) In addition to the conduct permitted by this rule, members of the State Bar and law firms may continue to be listed in a telephone directory, community directory or guide, law list or legal directory, or in a membership roster, membership register, membership directory or other membership directory or other membership list of a service club, charitable organization, fraternity, school alumni association or business, professional or trade association to which the member belongs, in the manner previously permitted by Rules 2-103(A)(5), (6) and (7) and 2-106(4) of the Rules of Professional Conduct extant immediately prior to effective date of this rule.

In re Smith
(U.S. Sup. Ct. Docket No. 77-56)

THE FACTS, ACCORDING TO:

Hearing Panel
(Adopted by
Supreme Court of
South Carolina)
Source: 233 S.E.2d 301

Counsel for Appellee
(South Carolina
Disciplinary Agency)
Source: Motion to Dismiss

Counsel for Appellant
(Attorney Smith)
Source: Jurisdictional Statement

Petitioner is a member of the Bar of this State. [p. 301]

The Respondent, Edna Smith, is a practicing attorney in Columbia, South Carolina, having been admitted to the Bar in September 1972. [p. 302]

Appellant Edna Smith is an attorney licensed to practice law in the State of South Carolina. [p. 2]

Appellant is a black woman who was admitted to the South Carolina Bar in September, 1972. [p. 7]

During the period in which the acts complained of in the complaint occurred, respondent was an associate in the Carolina Community Law Firm, in an expense sharing arrangement with each attorney keeping his own fees. One of the associate attorneys was a staff counsel for the ACLU and was a Counsel of Record in the Pierce case (hereafter mentioned). She was also a legal consultant of the South Carolina Council on Human Relations, from whom she received compensation, and was an officer of the Columbia

At the time of these events, Appellant Smith was engaged in private practice with the Carolina Community Law Firm (the firm's name was later changed to Buhl, Smith and Bagby). (Appellant's law partner, Herbert Buhl, is a staff attorney for the ACLU, receiving a salary for that position; Appellant's other law partner, Carlton Bagby, is a cooperating attorney with the ACLU.) In her capacity as a private attorney, she served as legal consultant to the South Carolina Council on

She is active in the ACLU of South Carolina. [p. 7]

Hearing Panel
(Adopted by
Supreme Court of
South Carolina)
Source: 233 S.E.2d 301

Branch of the ACLU, and was
a cooperating attorney with
the ACLU. [p. 302]

Counsel for Appellee
(South Carolina
Disciplinary Agency)
Source: Motion to Dismiss

Human Relations, a private organization, for which she received a fee of \$10,000 per year. She also acted as a cooperating attorney with the ACLU, serving as Vice-President and member of the Board of Directors of the South Carolina Chapter of that organization. [p. 2]

Counsel for Appellant
(Attorney Smith)
Source: Jurisdictional Statement

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In 1973, local and national newspapers reported that certain pregnant mothers on welfare in Aiken County, South Carolina, most of whom were black, were being sterilized or threatened with sterilization as a condition for continuing to receive Medicaid assistance. See "3 Carolina Doctors Are Under Inquiry in Sterilization of Welfare Mothers," New York Times, July 22, 1973, p. 30. [p. 7]

In response to information received through the South Carolina Council on Human

Pursuant to the request of her client, the Council on Human Rights, Appellant contacted

Mr. Gary Allen, who was active in a number of community organizations, knew some of the Medicaid patients

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Relations, she contacted one Gary Allen, in Aiken, South Carolina, to arrange for her to talk to people there who had been sterilized. [p. 302]

Counsel for Appellee
(South Carolina
Disciplinary Agency)
Source: Motion to Dismiss

one Gary Allen and requested that he set up a meeting between Appellant and certain women in Aiken County, South Carolina, who had been sterilized, or had been advised by their physician that they should undergo sterilization as a means of family planning. [p. 2]

Counsel for Appellant
(Attorney Smith)
Source: Jurisdictional Statement

who had been sterilized. A local organization to which Mr. Allen belonged contacted appellant through the South Carolina Council on Human Rights, a private, nonprofit organization, with which appellant was also associated, to request advice and assistance on behalf of the welfare mothers. In response to request, appellant went to [the meeting]. [p. 7]

The meeting was held in Aiken during the month of July, 1973, at the office of Gary Allen. Marietta Williams is a Black woman who had consented to be sterilized by Dr. Clovis Pierce. At the meeting in Gary Allen's office, the respondent advised those present, who included Mrs. Williams and other women who had been sterilized by Dr. Clovis H. Pierce, of their legal rights and specifically that they could bring suit

This meeting took place in the latter part of July, 1973. On the day of the meeting, a Mrs. Marietta Williams was approached by Mr. Allen as she left the Aiken County Hospital, where her newborn baby was critically ill. Mr. Allen requested that Mrs. Williams accompany him to his office, stating that there were some people at his office who would like to talk with her about her recent sterilization. Mrs. Williams, although she had no previous knowledge of the meeting, went to Mr. Allen's

In response to the request [from the local organization through the South Carolina Council on Human Rights], appellant went to Aiken, where she met with Mr. Allen and with three women who had been sterilized in Aiken County, including Mrs. Williams, the subject of the alleged solicitation. [p. 7]

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(Adopted by
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for money damages against
Dr. Pierce. [p. 302]

Here, by respondent's own
testimony, she met with
Mrs. Williams in Aiken,
gave unsolicited advice
as to what her rights
were as she, the respondent,
saw them. [p. 304]

Counsel for Appellee
(South Carolina
Disciplinary Agency)
Source: Motion to Dismiss

office, where she was introduced to Appellant Edna Smith. During the meeting which was attended by two other ladies and members of the press, Appellant advised Mrs. Williams of her legal rights and remedies in regard to her sterilization and informed her of her right to bring an action for money damages against her doctor. In talking with Mrs. Williams and the other ladies, Appellant represented herself to be an attorney and informed the group that the ACLU was an organization that could bring an action on their behalf for money damages against Dr. Pierce, a private physician in Aiken County. After discussing her sterilization with Appellant and being fully advised of her legal rights and remedies, Mrs. Williams informed Appellant that she would contact Appellant, if she decided to bring such an action. Appellant gave instructions that the ladies should write the ACLU if they desired that organization to bring suit for them. [pp. 2-3]

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(Adopted by
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Source: 233 S.E.2d 301

Counsel for Appellee
(South Carolina
Disciplinary Agency)
Source: Motion to Dismiss

There was no further contact between respondent and Mrs. Williams until Mrs. Williams received a letter from respondent dated August 30, 1973. In this letter respondent referred to the meeting in Mr. Allen's office and indicated that the ACLU would like to file a lawsuit for her for money against the doctor who performed the operation. This letter was written on the

[Appellant had given instructions that the ladies should write the ACLU if they desired that organization to bring suit for them.] In the early part of August, only one request had been received. Appellant was instructed by the ACLU to contact the other ladies again about filing suit. On August 30, 1973, without having been contacted by Mrs. Williams in any way during the

Counsel for Appellant
(Attorney Smith)
Source: Jurisdictional Statement

Counsel for Appellant
(Attorney Smith)
Source: Jurisdictional Statement

Following the Aiken meeting, appellant received several telephone calls and a letter from Mr. Allen, advising that Mrs. Williams wished to bring suit, and appellant was requested by Mr. Allen to write to Mrs. Williams. (Mrs. Williams testified that she had not told Mr. Allen she wanted to bring suit; however, the uncontradicted testimony of appellant and Mr. Allen was that Mr. Allen had so advised her, and the tribunals below made no finding discounting this testimony.) [p. 7]

In response to this request, appellant wrote the letter of August 30, 1973, that is the subject of this proceeding. [p. 8]

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Hearing Panel
(Adopted by
Supreme Court of
South Carolina)
Source: 233 S.E.2d 301

Counsel for Appellee
(South Carolina
Disciplinary Agency)
Source: Motion to Dismiss

Counsel for Appellant
(Attorney Smith)
Source: Jurisdictional Statement

Letterhead of the Carolina
Community Law Firm and
signed by her as attorney-
at-law. [p. 302]

Respondent followed up with
her letter of August 30,
1973, wherein she solicited
Mrs. Williams to join in a
class action suit for money
damages to be brought by
the ACLU. [p. 304]

interim, Appellant wrote to
Mrs. Williams on the station-
ery of her private law firm,
signing the letter as Attorney-
at-Law. [p. 3]

August 30, 1973

Mrs. Marietta Williams
347 Sumter Street
Aiken, South Carolina 29801

Dear Mrs. Williams:

You will probably remember me from talking with you at Mr. Allen's office in July about the sterilization performed on you. The American Civil Liberties Union would like to file a lawsuit on your behalf for money against the doctor who performed the operation. We will be coming to Aiken in the near future and would like to explain what is involved so you can understand what is going on.

Now I have a question to ask of you. Would you object to talking to a women's magazine about the situation in Aiken? The magazine is doing a feature story on the whole sterilization problem and wants to talk to you and others in South Carolina. If you don't mind doing this, call me collect at 254-8151 on Friday before 5:00, if you receive this letter in time. Or call me on Tuesday morning (after Labor Day) collect.

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Hearing Panel
(Adopted by
Supreme Court of
South Carolina)
Source: 233 S.E.2d 301

Counsel for Appellee
(South Carolina
Disciplinary Agency)
Source: Motion to Dismiss

Counsel for Appellant
(Attorney Smith)
Source: Jurisdictional Statement

I want to assure you that this interview is being done to show what is happening to women against their wishes, and is not being done to harm you in any way. But I want you to decide, so call me collect and let me know of your decision. This practice must stop.

About the lawsuit, if you are interested, let me know, and I'll let you know when we will come down to talk to you about it. We will be coming to talk to Mrs. Waters at the same time; she has already asked the American Civil Liberties Union to file a suit on her behalf.

Sincerely,

s/Edna Smith
Edna Smith
Attorney-at-Law
[pp. 25a-26a]

By Appellant's own admission at the disciplinary hearing, the letter was an attempt by her to seek out Mrs. Williams as a member of the plaintiff class in a lawsuit for money damages against the doctor who had performed the sterilization operation. [p. 4]

Shortly thereafter, Mrs. Williams called Appellant and informed her that she did not want to bring a legal action against Dr. Pierce. [p. 4]

Mrs. Williams, shortly after receiving this letter, went to Dr. Pierce's office for treatment for her child. Dr. Pierce's attorney was present, read the letter, and

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Hearing Panel
(Adopted by
Supreme Court of
South Carolina)
Source: 233 S.E.2d 301

Counsel for Appellee
(South Carolina
Disciplinary Agency)
Source: Motion to Dismiss

Counsel for Appellant
(Attorney Smith)
Source: Jurisdictional Statement

Prior to the institution of this proceeding, a class action entitled Jane Doe and Mary Roe, on their behalf and on behalf of all others similarly situated v. Clovis H. Pierce, M.D., et al., was commenced in the United States District Court of South Carolina to declare the acts of the defendant in violation of the First, Fourth, Fifth, Eighth, Ninth, Thirteenth and Fourteenth Amendments of the Constitution, to enjoin such acts, and for money damages and attorneys' fees. [p. 302]

Subsequently, two women did sue Dr. Pierce for money damages. (Doe v. Pierce, No. 74-475 (D.S.C. 1974). Plaintiffs requested \$15,000,000.00 in damages. This case was tried before a jury and resulted in a verdict against Dr. Pierce for one of the plaintiffs in the amount of \$5.00 nominal damages. On appeal, the Fourth Circuit Court of Appeals reversed this judgment finding that Dr. Pierce had not violated that plaintiff's civil rights under Section 1983.) The ladies were presented by attorneys of the American Civil Liberties Union (including Appellant's law partner, Carlton Bagby) who requested on behalf of their

Two women subsequently sued Dr. Pierce, Doe v. Pierce, No. 74-475 (D.S.C. 1974), but neither were represented by appellant or her associate employed by the ACLU. (The letter to Mrs. Williams had been in the possession of Dr. Pierce's attorney since August of 1973, and was known to the South Carolina Assistant Attorney General, who represented other defendants in Doe v. Pierce, in early April, 1974; however, the Attorney General did not forward the letter to the Board on Grievances and Discipline until August 19, 1974, after an attempt to have Doe v. Pierce dismissed for solicitation proved unsuccessful. The letter was forwarded by A. Camden Lewis, an attorney herein and for certain defendants in Doe v. Pierce.) [pp.8-9]

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Hearing Panel
(Adopted by
Supreme Court of
South Carolina)
Source: 233 S.E.2d 301

Counsel for Appellee
(South Carolina
Disciplinary Agency)
Source: Motion to Dismiss

Counsel for Appellant
(Attorney Smith)
Source: Jurisdictional Statement

clients that the court award attorneys fees. [p. 4]

The evidence presented indicated that the ACLU has only entered cases in which substantial civil liberties questions are involved, and that contrary to their former practice, they are now asking for fees, in addition to any damages that might be awarded to the plaintiffs, and that they are never reimbursed out of the damages awarded the plaintiffs. [p. 303]

Testimony at the hearing established that one of, if not the primary purpose of the ACLU, was the rendition of legal services. It was also set out in respondent's Pre-trial Memorandum that the ACLU and its state affiliates on any given day are involved in several thousand active cases throughout the country. It is, also, the policy of the ACLU to ask for attorneys' fees in their lawsuits, and their fees go into its central fund and are used among other things to pay costs and salaries

The decision below threatens to impair the legal assistance activities on behalf of civil liberties of the American Civil Liberties Union and its affiliated organizations. The ACLU, which is the oldest and largest organization in the nation devoted exclusively to the cause of civil liberties, has for years stated frankly in The Guide for ACLU Litigation, ¶5, that:

It is not necessary to await clients seeking out the Union; it is often better for the Union to take the initiative in civil liberties cases. NAACP v. Button, 371 U.S. 415 (1963), provides that organizations need not stand by while potential litigants forfeit through ignorance their constitutional rights. An organization with our purposes can thus advise people that it will handle cases for them.

The ACLU's opinion of its function is widely shared. Referring to the

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Counsel for Appellee
(South Carolina
Disciplinary Agency)
Source: Motion to Dismiss

and expenses of staff
attorneys. [p. 305]

The ACLU, the non-profit organization herein involved, by its own admission, may have several thousand lawsuits in progress at any one day and they classify themselves as private attorneys general. It follows, therefore, that its primary purpose is the rendition of legal services. [p. 305]

As pointed out litigation is the primary purpose of the ACLU; it is not simply incidental to its primary purpose. [p. 306]

activities of appellant regarding the origin of Doe v. Pierce, the case subsequently filed on the Aiken sterilizations, the Honorable Sol Blatt, Jr., United States District Judge for the District of South Carolina, made the following statement at a hearing on September 24, 1974:

This Court feels in its posture of [sic] the American Civil Liberties Union has a duty and an obligation under the manner in which it operates to seek out and help those who it feels are not able to help themselves, either their lack of knowledge or lack of funds, the Court finds no fault with the situation out of which this suit arose with the attorneys connected with the ACLU in contacting, if that in fact did happen. . . (Emphasis supplied.) Deposition of Mary Roe (Shirley Brown), Doe v. Pierce, No. 74-475 (D.S.C. 1974) (Sept. 24, 1974, p. 23).

(Three judges of the United States Court of Appeals for the Fourth Circuit reached a similar conclusion, 33a:

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(Attorney Smith)
Source: Jurisdictional Statement

The services of ACLU--assisting lay persons to recognize their legal rights and making counsel available--are the very services for which the individual plaintiff is sought to be disciplined and they are constitutionally protected activities.)

Obviously, if the decision below is sustained, the ACLU and countless other legal assistance organizations will be barred from affirmatively offering assistance to the poor and untutored. (The approach adopted in this case could be applied to the activities of the National Right to Work Defense Fund; the NAACP Legal Defense and Education Fund, Inc.; the Mexican-American Legal Defense and Education Fund; the Sierra Club Legal Defense Fund; the Natural Resources Defense Council; the National Chamber Litigation Center (U.S. Chamber of Commerce); the Puerto Rican Legal Defense and Education Fund; and the Native American Rights Fund, to name only a few.) [pp. 13-15]

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Counsel for Appellant
(Attorney Smith)
Source: Jurisdictional Statement

The evidence is inconclusive as to whether the respondent solicited Mrs. Williams on her own behalf, but she did solicit Mrs. Williams on behalf of the ACLU, which would benefit financially in the event of successful prosecution of the suit for money damages. [p. 303]

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In re Smith
(U. S. Sup. Ct. Docket No. 77-56)

THE RULES

South Carolina

American Bar Association

California

DR 2-103(D)(5)*

(D) A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services or those of his partners or associates. However, he may cooperate in a dignified manner with the legal service activities of any of the following, provided that his independent professional judgment is exercised in behalf of his client without interference or control by any organization or other person:

(5) Any other non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only in

DR 2-103(D)(4)

(D) A lawyer shall not knowingly assist a person or organization that furnishes or pays for legal services to others to promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm except as permitted in DR 2-101 (B). However, this does not prohibit a lawyer or his partner or associate or any other lawyer affiliated with him or his firm from being recommended, employed or paid by, or cooperating with, one of the following offices or organizations that promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm if there is no interference with the exercise of independent professional judgment in behalf

Rule 2-104(F)

(F) The participation of a member of the State Bar in a legal aid plan or program for the furnishing of services to indigents or pursuant to the plan or program of a non-profit organization formed for charitable or other public purposes which furnishes legal services to persons only in respect of their civic or political or constitutional rights and not otherwise in furtherance of such charitable or other public purposes of such organization, and the publicizing of such plans or programs are not, of themselves, violations of these Rules of Professional Conduct provided the name of such member of the State Bar is not publicized. Nothing in this rule shall prohibit a representative of such a plan or program from stating response to inquiries as to the identity of such member of the State Bar such member's name.

* ABA Disciplinary Rule in effect prior to March 1, 1974

those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities, and only if the following conditions, unless prohibited by such interpretation, are met:

(a) The primary purposes of such organization do not include the rendition of legal services.

(b) The recommending, furnishing, or paying for legal services to its members is incidental and reasonably related to the primary purposes of such organization.

(c) Such organization does not derive a financial benefit from the rendition of legal services by the lawyer.

(d) The member or beneficiary for whom the legal services are rendered, and not such organization, is recognized as the client of the lawyer in that matter.

of his client:

(4) Any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:

(a) Such organization, including any affiliate, is so organized and operated that no profit is derived by it from the rendition of legal services by lawyers, and that, if the organization is organized for profit, the legal services are not rendered by lawyers employed, directed, supervised or selected by it except in connection with matters where such organization bears ultimate liability of its member or beneficiary

(b) Neither the lawyer, nor his partner, nor associate, nor any other lawyer affiliated with him or his firm, nor any non-lawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to

such lawyer, partner, associate or affiliated lawyer.

(c) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.

(d) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter.

(e) Any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, select counsel other than that furnished, selected or approved by the organization for the particular matter involved; and the legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved would be unethical, improper or inadequate under the circumstances

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of the matter involved and the plan provides an appropriate procedure for seeking such relief.

(f) The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court and other legal requirements, that govern its legal service operations.

(g) Such organization has filed with the appropriate disciplinary authority at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel, and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.

California